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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

17 || SK HYNIX INC., et al..

CASE NO. CV 00-20905 RMW

18 || Plaintiffs,

**RAMBUS INC.'S BRIEF IN SUPPORT
OF ITS PROPOSED JUDGMENT
SUBMITTED PURSUANT TO THE
COURT'S MAY 8, 2013 ORDER**

12

20 | P A M B U S I N C

Defendant

I. INTRODUCTION

Rambus Inc. (“Rambus”) respectfully submits this brief in support of its Proposed Judgment pursuant to the Court’s Order of May 8, 2013 (Dkt. 4244) (“May 8 Order”). The ordering paragraph of the May 8 Order stated that:

As a sanction for Rambus's spoliation of evidence, the court hereby imposes a monetary sanction of \$250 million to be applied as a credit against Rambus's judgment against SK hynix.

Id. at 34. As set out in Rambus’s previous briefs and as discussed at the December 19, 2012 hearing, Rambus believes that a sanction of this magnitude is unduly severe, unprecedented and not supported by the evidence or the case law. Without waiving these arguments, Rambus has submitted a proposed judgment that, pursuant to the May 8 Order, credits \$250 million against the damages, reasonable royalties, and prejudgment interest previously awarded to Rambus by the terms of the Court’s prior Final Judgment. *See* Rambus’s [Proposed] Final Judgment, concurrently submitted (“Rambus’s Proposed Judgment”); *see also* Final Judgment, Mar. 10, 2009 (Dkt. 3911) (“2009 Final Judgment”).

The SK hynix entities (“SK hynix”) take a very different approach. SK hynix proposes that the Court increase the monetary amount of the sanction by \$135 million, from \$250 million to \$385 million. The resulting sanction would amount to a 77% reduction of the original judgment, in contravention of both the May 8 Order and the governing case law. The Court has itself recognized that the \$250 million sanction, which cuts in half the compensatory damages and interest due to Rambus, is “severe.” May 8 Order at 33. SK hynix’s proposed approach would exacerbate the already-excessive nature of the Court’s \$250 million sanction and would raise additional Seventh Amendment issues.

Finally, SK hynix also proposes that the Court dismiss four of the claims-in-suit with prejudice on the basis of PTO reexaminations. That position is directly contrary to the May 8 Order, which denied SK hynix’s motion for summary judgment of invalidity. May 8 Order at 9-18.

Rambus therefore requests that the Court reject SK hynix's proposal and enter Rambus's proposed judgment forthwith.

1 **II. THE PROPOSED JUDGMENTS**

2 *Rambus's Proposed Judgment:* Rambus's Proposed Judgment follows the May 8
 3 Order by crediting the \$250 million sanction against the damages and prejudgment interest due to
 4 Rambus under the 2009 Final Judgment. That Judgment, which resulted from a jury verdict of
 5 \$ 306,967,272 and a subsequent remittitur, awarded to Rambus patent infringement damages of
 6 \$349,035,842 through January 31, 2009. *See* 2009 Final Judgment at ¶¶ 1-2; May 8 Order at 3.
 7 The Court further awarded Rambus ongoing royalties through April 17, 2010. *See* 2009 Final
 8 Judgment at ¶ 7. SK hynix has subsequently accrued \$69,458,127 in ongoing royalties under the
 9 terms of the 2009 Final Judgment. *See* Rambus's Proposed Judgment at ¶ 3. The sum of
 10 compensatory damages due under the 2009 Final Judgment is therefore \$418,493,969. *See*
 11 Rambus's Proposed Judgment at ¶¶ 1-3.

12 The 2009 Final Judgment also awarded prejudgment interest to Rambus under a
 13 pre-determined methodology. *See* 2009 Final Judgment at ¶ 4; *see also* Order Regarding
 14 Prejudgment Interest, Aug. 30, 2006 (Dkt. 2402). The prejudgment interest on the \$418 million
 15 damages award is \$84,478,928 as of today's date. *See* Ex. A to Rambus's Proposed Judgment.¹
 16 The total damages and interest that would be due under the 2009 Final Judgment is therefore
 17 \$502,972,896 as of today's date.

18 In accordance with the May 8 Order, Rambus's proposed judgment credits \$250
 19 million against that award, which yields a net damages award, as of May 20, 2013, of
 20 \$252,972,896. With adjustments for the various costs that the Court previously awarded to each
 21 side, the net judgment as of today's date is \$245,607,993. *See* Rambus's Proposed Judgment at
 22 ¶¶ 7-10; *id.* at Ex. A. That amount is roughly half of what Rambus would have been entitled to if

23 ¹ The prejudgment interest amount changes daily. For the Court's convenience, Exhibit A to
 24 Rambus's Proposed Judgment sets out the amount of prejudgment interest for each day from May
 25 20, 2013 through June 14, 2013. The amount of prejudgment interest also affects the net damages
 26 award (before adjustments for costs) set forth in Ordering Paragraph 7 of Rambus's Proposed
 27 Judgment, and the net judgment (after adjustments for costs) set forth in Ordering Paragraph 10
 28 of Rambus's Proposed Judgment. Exhibit A shows the daily amounts of those two figures
 through June 14, 2013 as well.

29 Rambus and Hynix have met and conferred regarding the proper calculation of prejudgment
 30 interest under the parties' respective proposed judgments, and have agreed that the prejudgment
 31 interest reflected herein and in the proposed judgments are correct.

1 the 2009 Final Judgment were reinstated in full.

2 *SK hynix's Proposed Judgment:* SK hynix's proposed judgment fails completely
 3 to apply a “\$250 million … credit against Rambus’s judgment against SK hynix,” as required by
 4 the May 8 Order. *See* May 8 Order at 34. Instead, SK hynix would recalculate damages at
 5 \$95,414,034 for the entire infringement period. With prejudgment interest of \$22,253,320, the
 6 total damages award that SK hynix proposes is \$117,667,354, which represents a 77% reduction
 7 of the amount due Rambus under the terms of the 2009 Final Judgment. After adjustments for
 8 costs, the net judgment proposed by SK hynix is \$110,302,451.33.

9 **III. ARGUMENT**

10 A. **Rambus's Proposed Judgment Implements The Court's \$250 Million**
 11 **Sanction. SK hynix's Request To Increase The Sanction To \$385 Million**
 Should Be Rejected.

12 As the May 8 Order explains, this patent infringement case has been extensively
 13 litigated over the past 12½ years. May 8 Order at 3-4. After lengthy pre-trial proceedings and
 14 three separate phases of trial, this Court entered a Final Judgment on March 10, 2009 in
 15 Rambus's favor. *Id.* On May 13, 2011, the Federal Circuit vacated the 2009 Final Judgment with
 16 respect to the Court's finding that Rambus had not engaged in spoliation and remanded for further
 17 proceedings on that issue. The Final Judgment was otherwise affirmed. *Id.* at 3, *citing Hynix*
 18 *Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1336, 1355 (Fed. Cir. 2011). *See also* May 8 Order
 19 at 22-23 (rejecting SK hynix's request for a new trial on damages and holding that because the
 20 jury had, without objection by SK hynix, awarded damages based upon infringement by products,
 21 not by patent claim, “the damages award is fully supported.”).

22 In its September 21, 2012 Order on remand regarding spoliation issues, this Court
 23 concluded that the most appropriate sanction for Rambus's spoliation of evidence was to strike
 24 from the record all evidence supporting a royalty in excess of a ““reasonable and non-
 25 discriminatory royalty.”” *Id.* at 4, *citing Hynix Semiconductor Inc. v. Rambus Inc.*, 897 F. Supp.
 26 2d 939, 986 (N.D. Cal. 2012). After further briefing and argument, however, the Court concluded
 27 in its May 8 Order that “trying to fashion an after-the-fact evidentiary exclusion is *not* the most
 28 appropriate mechanism by which to sanction Rambus.” *Id.* at 30 (emphasis added). Instead, the

1 Court concluded that it should enter a monetary sanction that “takes into account” the rates paid
 2 to Rambus by SK hynix’s competitors, as “a guideline only,” as well as other considerations. *Id.*
 3 at 30, 32.² The Court made clear that it “is not attempting to calculate *damages* from SK hynix’s
 4 infringement of Rambus’s patents, but rather to fashion an appropriate *sanction* for Rambus’s
 5 spoliation.” *Id.* (emphasis added). The Court then concluded that while the “[i]mposition of a
 6 monetary sanction is an imprecise, imperfect process,” a “monetary sanction of \$250,000,000 to
 7 be applied as a credit against Rambus’s judgment against SK hynix” was appropriate. *Id.* at 33.

8 Rambus’s proposed judgment applies the \$250 million credit to the judgment as
 9 directed by the Court. SK hynix, however, is seeking a much larger sanction. SK is, in effect,
 10 proposing an increase of the sanction fixed by the May 8 Order from \$250 million to \$385
 11 million.³

12 There is no justification for so drastically increasing the sanction against Rambus.
 13 The Court has recognized that a \$250 million sanction is already “severe” and approaches being
 14 “excessive.” May 8 Order at 33. It is also unprecedeted. During the briefing on remand that led
 15 to the Court’s decisions on spoliation and the appropriate sanction, no party cited any decision
 16 imposing a monetary sanction remotely close to \$250 million, and Rambus is aware of none.
 17 Indeed, courts have imposed significantly smaller sanctions (i.e., most under \$5 million) even
 18 where the spoliation was found to be egregious. Cf., e.g., *United States v. Phillip Morris USA,*
 19 *Inc.*, 327 F. Supp. 2d 21, 25-26 (D.D.C. 2004) (\$2.75 million sanction for destruction of emails
 20 during litigation in contravention of court order to preserve them); *Bradley v. Sunbeam Corp.*,
 21 No. Civ. A. 5:99CV144, 2003 WL 21982038, at *19 (N.D. W. Va., Aug. 4, 2003) (collecting
 22 cases with spoliation sanctions ranging from thousands of dollars to \$1 million), *reversed on*
 23 *other grounds*, 378 F.3d 373 (4th Cir. 2004). See also *Willoughby*, Sanctions for E-Discovery

24 ² The Court acknowledged that various issues Rambus had raised, such as “the benefit to SK
 25 hynix of delayed payment” and the distinction between worldwide licenses and licenses limited to
 26 U.S. sales, “make it difficult to estimate the prejudice to SK hynix from Rambus’s spoliation with
 27 any precision” May 8 order at 32. Rambus notes in this regard that SK hynix has promised
 28 to appeal the Court’s Final Judgment; it will presumably seek to delay any payments for years to
 come.

³ If prejudgment interest is ignored, the difference between SK hynix’s damages figure of \$95
 million and the \$418 million in damages due under the 2009 Final Judgment would still be \$323
 million, far in excess of the \$250 million sanction fixed by the Court.

1 Violations: By the Numbers, 60 Duke L.J. 789, 814-15 (2010) (surveying federal court monetary
 2 sanctions in e-discovery cases and noting that “[t]he awards ranged from \$250 to \$8,830,983.69,”
 3 with only five reported awards over \$5 million).

4 SK hynix’s proposal to enlarge the sanction to \$385 million is clearly excessive.
 5 The Federal Circuit requires selection of ““the least onerous sanction corresponding to the
 6 willfulness of the destructive act and the prejudice suffered by the victim.”” *Micron Tech., Inc. v.*
 7 *Rambus Inc.*, 645 F.3d 1311, 1329 (Fed. Cir. 2011) (“*Micron II*”), citing *Schmid v. Milwaukee*
 8 *Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994). The \$385 million sanction that SK hynix seeks
 9 fails to satisfy this standard, as demonstrated by this Court’s finding that a \$250 million sanction
 10 would “unquestionably deter Rambus and others from engaging in similar conduct” and “strikes
 11 the appropriate balance between acknowledging that the majority of Rambus’s patents have been
 12 determined to be valid and recognizing that Rambus’s spoliation of evidence must be redressed in
 13 [a] meaningful way.” May 8 Order at 33.

14 B. **Considerations Of Royalty Rates Paid By Other DRAM Manufacturers Do**
 15 **Not Justify Increasing The Sanction To \$385 Million.**

16 During the parties’ meet and confer regarding their respective proposed judgments,
 17 SK hynix explained that its proposed \$95 million in pre-interest damages results from a
 18 calculation that applies a 0.85% royalty rate to SK hynix’s U.S. sales. The Court’s May 8 Order
 19 had compared that rate to the royalty rates paid by other DRAM manufacturers. *See id.* But
 20 neither the royalty rate paid by other DRAM companies, nor the Court’s estimate of what it
 21 deems an appropriate rate, is the sole determinant of the amount of the spoliation sanction. As the
 22 Court explained, its royalty rate estimate “serves as a guideline only; the court is not attempting to
 23 calculate damages from SK hynix’s infringement of Rambus’s patents, but rather to fashion an
 24 appropriate sanction for Rambus’s spoliation.” *Id.* at 32. The sanction that the Court imposed,
 25 after considering various factors, is a \$250 million credit against the judgment. *Id.* at 34.

26 SK hynix attempts to increase the amount of the monetary sanctions so that it
 27 reflects, in some mechanical fashion, the rates paid in the past by other DRAM manufacturers
 28 (including manufacturers who have left the market and are no longer competing with SK hynix

1 for DRAM sales). This approach would recalculate the jury's damages award in contravention of
 2 settled Seventh Amendment principles. "The amount of damages based on a reasonable royalty is
 3 an issue of fact for the jury." *Lucent Tech., Inc. v. Microsoft Corp.*, 837 F. Supp. 2d 1107, 1116
 4 (S.D. Cal. 2011), citing *Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1394 (Fed. Cir. 2003).
 5 As a result, a court may not, "according to its own estimate of the amount of damages which the
 6 plaintiff ought to have recovered, ... enter an absolute judgment for any other sum than that
 7 assessed by the jury." *Hetzell v. Prince William County*, 523 U.S. 208, 211 (1998), citing *Kennon*
 8 *v. Gilmer*, 131 U.S. 22 (1889); *accord Minks v. Polaris Indus., Inc.*, 546 F.3d 1364, 1372 (Fed.
 9 Cir. 2008) (reversing judgment where district court reduced jury-awarded damages by weighing
 10 evidence regarding royalty rates from different license agreements).

11 Here, the reasonable royalty due to Rambus was determined by a jury, and the
 12 amount remitted from that jury verdict formed the basis of the damages specified in the 2009
 13 Final Judgment. SK hynix's request that the Court increase the sanction to \$385 million in order
 14 to conform Rambus's compensatory damages precisely to a particular view of a "reasonable"
 15 royalty rate is a request for a recalculation of damages. The Court has expressly stated that it is
 16 not engaging in such an exercise. *See* May 8 Order at 30 (explaining that although initially "the
 17 court believed that imposition of a FRAND rate modified to take into account what SK hynix's
 18 competitors paid during the relevant period would carry out its intention of placing SK hynix on
 19 essentially equal footing with its competitors, ... review of the parties' briefing and the authorities
 20 discussed above has persuaded the court that trying to fashion an after-the-fact evidentiary
 21 exclusion is *not* the most appropriate mechanism by which to sanction Rambus") (emphasis
 22 added); *id.* at 32 (stating that the Court was not "attempting to calculate a FRAND rate in
 23 connection with a *damages* award for patent infringement"). SK hynix's proposed damages
 24 amount should accordingly be rejected.

25 **C. SK hynix Will Not Be Prejudiced By The Court's \$250 Million Sanction.**

26 SK hynix cannot claim to be prejudiced by this Court's "severe" \$250 million
 27 sanction that reduces *in half* the compensatory damages SK hynix owes Rambus for its massive,
 28 decade-long infringement of Rambus's valid patents. SK hynix might argue that a \$250 million

1 sanction results in a higher effective royalty rate than the rates paid by some of its competitors.
 2 But as noted above, royalty rates are a “guideline only” in the Court’s consideration of an
 3 appropriate sanction under the *Micron II* framework. *Id.* at 32. In any event, SK hynix is
 4 differently situated from the other DRAM manufacturers it cites, and SK hynix has never
 5 presented a shred of evidence that a future payment to Rambus of any sum would actually
 6 disadvantage SK hynix with respect to its remaining competitors.

7 There is no reason for this Court to presume that prejudice to SK hynix would
 8 occur if the Court were to impose “only” a \$250 million sanction, for several reasons. *First*, other
 9 DRAM manufacturers including Elpida, Samsung, and Infineon paid royalties on a worldwide
 10 basis, while SK hynix proposes that it pay royalties only for U.S. sales. Rambus has previously
 11 demonstrated that SK hynix would have to pay a much higher effective rate on U.S. net sales for
 12 it to have paid an amount comparable to the amount paid on average by other DRAM
 13 manufacturers on worldwide sales. Declaration of Brian M. Hammer in Support of Rambus’s Br.
 14 Regarding the Court’s Determination of a RAND Rate Pursuant to Its September 21, 2012 Order,
 15 Nov. 13, 2013 (previously submitted under seal), at ¶ 18.

16 *Second*, unlike other DRAM manufacturers who have taken licenses and paid
 17 royalties, SK hynix has for thirteen years retained funds that it should have been paying Rambus
 18 for the use of its inventions. By withholding from Rambus royalty payments on its infringing
 19 products, SK hynix not only deprived Rambus of revenue that Rambus needed and was owed, but
 20 SK hynix also gained an advantage over royalty-paying DRAM manufacturers. Using SK
 21 hynix’s cost of capital as a measure of the economic value of delay, and also taking into account
 22 the difference between SK hynix’s proposed U.S.-only sales base vis-à-vis the worldwide sales
 23 base for royalties paid by others, Rambus has shown that SK hynix would have to pay an effective
 24 royalty rate in excess of 2% to be on an economically level playing field with the other DRAM
 25 manufacturers. *Id.* at ¶ 19.

26 *Third*, unlike other DRAM manufacturers who took licenses without litigation
 27 (e.g., Elpida), or who settled with Rambus before their cases were resolved (Samsung and
 28 Infineon), SK hynix is an adjudicated infringer. SK hynix chose to litigate to judgment and

1 assumed the risk that it might have to pay a higher rate than those who did not. “[A] reasonable
 2 royalty may permissibly reflect ‘[t]he fact that an infringer had to be ordered by a court to pay
 3 damages, rather than agreeing to a reasonable royalty.’” *ResQNet.com, Inc. v. Lansa, Inc.*, 594
 4 F.3d 860, 872 (Fed. Cir. 2010) (citation omitted). Whereas rates from voluntary licenses may
 5 reflect some uncertainty regarding infringement and validity, “the removal of some of the
 6 uncertainty about infringement or invalidity of the Rambus patents may justify a ... higher rate.”
 7 Order Granting Hynix’s Mot. for a New Trial on the Issue of Damages Unless Rambus Elects
 8 Remittitur of the Jury Award to \$133,584,129, July 14, 2006 (Dkt. 2197), at 4.⁴

9 **D. The Judgment Must Include All Ten Patent Claims Found Not Invalid And
 10 Infringed.**

11 SK hynix argues that four of the claims-in-suit that are subject to pending
 12 reexamination proceedings – claim 33 of Patent No. 6,324,120, claim 36 of Patent No. 6,378,020,
 13 claim 28 of Patent No. 6,426,916, and claim 16 of Patent No. 6,452,863 – should be dismissed
 14 with prejudice. That position is squarely foreclosed by the Court’s May 8 Order, which *denied*
 15 SK hynix’s motion for summary judgment and found that the mandate rule precludes any
 16 redetermination of patent validity on remand. May 8 Order at 9-18; *see also id.* at 14 (“SK
 17 hynix’s motion for summary judgment is subject to denial as barred by that rule”). Moreover, as
 18 Rambus has shown, SK hynix’s summary judgment bid failed on multiple additional grounds,
 19 including the non-final status of the reexamination proceedings, the differences in legal standards
 20 between PTO and district court proceedings, and discretionary estoppel factors. *See* Rambus’s
 21 Consolidated Opposition to Hynix’s Motions for Summary Judgment, etc., Nov. 20, 2012 (Dkt.
 22 4193), at 13-28. SK hynix’s attempt to circumvent the May 8 Order should be rejected.

23 **IV. CONCLUSION**

24 The Court has recognized that it is “difficult to estimate the prejudice to SK hynix
 25 from Rambus’s spoliation with any precision.” May 8 Order at 32. The above factors amply
 26 show that a \$250 million sanction—which appears to be by far the largest monetary sanction ever

27 ⁴ Moreover, SK hynix’s own defiance of Rambus’s patent rights may have exerted downward
 28 pressure on the rates paid by others who took licenses. *See ResQNet.com*, 594 F.3d at 872 (“this
 court has long recognized that a reasonable royalty can be different than a given royalty when, for
 example, widespread infringement artificially depressed past licenses”).

1 imposed for spoliation—will not put SK hynix at any material disadvantage vis-à-vis other
2 DRAM manufacturers. There is thus no basis to increase the sanction from \$250 million to \$385
3 million. For these and all the foregoing reasons, Rambus respectfully requests that the Court
4 enter the proposed judgment submitted by Rambus and that it reject the proposed judgment
5 submitted by SK hynix.

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7 Dated: May 20, 2013

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SIDLEY AUSTIN LLP

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By: _____/s/ *Gregory P. Stone*
Gregory P. Stone

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12 Attorneys for RAMBUS INC.
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